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Docket No. FD 35393

**National Grid's Motion requests the Board to hold this proceeding in abeyance to allow the parties to complete their negotiations concerning the relocation of certain towers or poles supporting National Grid's O-141S transmission line on P&W's right-of-way between Worcester and Barbers, MA. P&W filed a Reply in opposition to National Grid's Motion on April 18, 2011 ("April 18 Reply"). The April 18 Reply contains misleading and inaccurate statements concerning (1) the status of the parties' negotiations for relocation of the transmission line and (2) National Grid's position on whether M.G.L. c. 164, § 73 prevents P&W from requiring National Grid to relocate its transmission line. This Reply sets the record straight concerning the negotiations and the role M.G.L. c. 164, § 73 plays in connection with**

relocation of a lawfully-constructed transmission line and poles that occupy a railroad's property.

The Parties' Negotiations Contradict P&W's Allegations. P&W's April 18 Reply states that National Grid has been dilatory in negotiating the relocation of the O-141S line's poles and that National Grid has no incentive to finalize an agreement with P&W because of National Grid's position that "M.G.L. c. 164, § 73 prevents P&W from forcing National Grid to relocate its poles" (April 18 Reply at 2). P&W also claims that a resolution of the relocation issues is needed to "permit P&W to expand its operations," and that P&W "needs to move forward with its plans [to construct a second track between Worcester and Barbers] – plans that have now been delayed for more than two years." *Id.*

P&W's claim that National Grid has dragged its feet in negotiations is self-serving and unsupported. In its original reply to P&W's petition for declaratory order filed August 30, 2010, National Grid described the negotiations between the parties prior to the filing of P&W's petition for declaratory order on July 20, 2010, and demonstrated that National Grid had been diligent in pursuing a voluntary resolution of the relocation issues. Since then, National Grid has continued to cooperate with P&W in engineering a mutually acceptable relocation of the poles (completed), negotiating the terms for a new easement for the occupation of P&W's right-of-way (completed),<sup>1</sup> and negotiating compensation terms (in progress). In actual fact, National Grid has been driving the

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<sup>1</sup> A new easement was necessitated by P&W's abrupt termination of the existing transmission line license agreements in March 2010.

discussions with P&W and diligently engineering the relocation of its transmission line. To set the record straight, a timeline for the negotiations since the filing of P&W's petition is attached hereto as Appendix 1. To date, NG has expended, in good faith, a total of approximately \$227,000 to design the relocation and obtain surveys and appraisals for the project. Notably, \$80,000 of these costs is related to the survey obtained by National Grid to identify the limits of P&W's right of way and any encumbrances. P&W then used this survey to design its second track in October 2010. Prior to that time, P&W had not prepared design plans for its second track.

The parties have also made considerable recent progress in negotiating compensation for a new easement for the O-141S line. National Grid has completed (and provided to P&W) a cost estimate for removing and relocating the poles and line in accordance with the agreement on the physical aspects of the relocation reached by the parties in late 2010. The total estimated cost (which reflects P&W's termination of the previously-existing license agreements) is approximately \${ }. National Grid has also completed (and provided to P&W) two formal appraisals of the value of the easement the parties have negotiated for the O-141S line's poles to remain on P&W's property.<sup>2</sup> The current appraisal values the easement at approximately \${ }.

P&W's April 18 Reply fails to mention P&W's preferred alternative to resolution of the issues between the parties, which does not involve relocation of the O-

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<sup>2</sup> A second appraisal was prepared because of adjustments in the location of the poles under the final easement terms after the initial appraisal was completed; it was provided to P&W approximately a week prior to the filing of this Reply.

141S line poles at all. Rather, since January 2010, P&W has indicated numerous times during the parties' negotiations that its objectives can be accomplished by leaving the poles in their present location, and acquiring property from other parties (in particular Pan Am Railways, which has an out-of-service, single-track line parallel to P&W's line between Worcester and Barbers) for P&W's proposed second track.<sup>3</sup> In fact, P&W has proposed that National Grid leave the O-141S line and poles in place and instead pay P&W one-half the avoided cost of removing/relocating the poles, which P&W claims it would then use to acquire other property needed for construction of its second track. Based on the best information currently available, the payment to P&W would equal approximately \${

}. National Grid is presently awaiting P&W's response to the relocation cost estimate and easement appraisal, and is prepared to move forward promptly to complete an agreement for the resolution that P&W prefers.

P&W's claims concerning alleged dilatory tactics by National Grid are further belied by P&W's failure to design a second track until October 2010 when National Grid provided the survey it had obtained, as well as P&W's admission that it has done nothing to ascertain the cost of acquiring the necessary property rights from others (*i.e.*, Pan Am Railways) to construct a second track even though that appears to be its preferred option. P&W's claim in its April 18 Reply that it "needs to move forward with

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<sup>3</sup> As indicated in National Grid's August 30, 2010 reply to P&W's petition for declaratory order, it is highly unlikely that P&W can construct a second track between Worcester and Barbers without acquiring the Pan Am right-of-way.

its plans” to construct a second track and that National Grid is preventing it from doing so (*id.* at 2) is disingenuous and contradicted by P&W’s actions.

P&W Misrepresents National Grid’s Alleged Reliance on M.G.L. c. 164, §

73. P&W has also mis-characterized National Grid’s position with respect to whether M.G.L. c. 164, § 73 prevents P&W from forcing National Grid to relocate the O-141S line’s poles. National Grid’s position is only that M.G.L. c. 164, § 73 is not pre-empted under federal law unless its requirements with respect to the location of transmission lines, as applied, unreasonably interfere with P&W’s railroad operations. Stated differently, National Grid acknowledges that § 73 would be preempted if it prevented P&W from using its property for railroad purposes regardless of any interference from transmission lines and poles. But it does not do this (and thus is not preempted).

P&W’s characterization of National Grid’s position ignores the interplay between the separate Massachusetts statutes involving the condemnation of property for transmission lines and the removal/relocation of such lines. In other states in which National Grid operates, electric utilities (including the owners/operators of transmission lines) are provided with the statutory right to condemn and locate utility facilities on railroad rights-of-way.<sup>4</sup> The exercise of state eminent domain power for overhead and underground utility crossings of railroads and occupancy of railroad property has been

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<sup>4</sup> See Vt. Stat. Ann. Tit. 30 §§ 110, 110a, 2513(a) (2011); N.H. Rev. Stat. Ann. §371:24 (2011); R.I. Gen. Laws § 39-1-31(2010); N.Y. Transp. Corp. Law §11(3) (2011); see also *Long Island R.R. Co. v. Long Island Lighting Co.*, 479 N.Y.S.2d (N.Y. App. Div. 1984) (disallowing a railroad’s attempt to block an eminent domain taking of its land in New York to be used for a parallel electric transmission line).

routinely approved by the courts, provided such crossing or occupancy of the railroad right-of-way does not interfere with the railroad's use of its property to conduct railroad operations. *See, e.g., Fort Worth & Western R.R. Co. v. Enbridge Gathering (NE Texas Liquids), L.P.*, 298 S.W.3d 392, 398-401 (Tex. Ct. App. 2009); *Wisconsin Cent. Ltd. v. Public Serv. Comm'n of Wis.*, 95 F.3d 1359 (7th Cir. 1996); *Dakota, Minn. & E. R.R. Corp. v. Rounds*, 422 F.Supp.2d 1073 (S.D.S.D. 2006).

Massachusetts approaches the condemnation and use of railroad property for transmission lines more favorably towards railroads. Two statutory provisions are involved, M.G.L. c. 164, § 73 (the one directly addressed by P&W's petition for declaratory order), and the immediately preceding section, M.G.L. c. 164, § 72. Under § 72 an electric or transmission company may petition the Massachusetts Department of Public Utilities ("MADPU") for authority to construct and use or continue to use as constructed an electric transmission line, and the MADPU may authorize the company to use the power of eminent domain to take the land or right-of-way necessary for the construction and use or continued use of such transmission line along a prescribed route. However, this section does not allow condemnation of railroad rights-of-way, as specifically set forth below:

No lands or rights of way or other easements therein shall be taken by eminent domain under the provisions of this section . . . within the location of any railroad, electric railroad or street railway company except with the consent of such company and on such terms and conditions as it may impose or except as otherwise provided in this chapter.

Thus, unlike the situation in other states, a utility in Massachusetts does not have the power to condemn for a transmission line crossing or parallel occupation within the location of a railroad. However, this is where M.G.L. ch. 64, § 73 comes into play.<sup>5</sup>

Section 73 complements § 72 by granting electric and transmission companies the right to cross railroads with transmission lines, subject to agreement with the railroad involved or to terms (including compensation) established by the MADPU if the parties are unable to agree. Section 73 does not grant the right to install structures such as poles on railroad property; however, once such structures have been lawfully constructed on railroad property (as was the case with the O-141S line), the electric or transmission company cannot be required to remove or cease to operate the line (and structures) without the MADPU's consent. Prior to giving such consent, the MADPU must provide notice to interested parties (including the affected railroad) and a hearing, and if the agency concludes that the continued operation of the facilities "will serve the public convenience and is consistent with the public interest, it shall specify the terms and conditions for the continued operation thereof, including compensation to any person or corporation lawfully entitled thereto." Although the MADPU has yet to be heard from on this matter, it is clear to National Grid that the agency must take into account the effect of the continued existence and operation of the transmission facilities on the operations of the railroad involved, and (as with the condemnation laws in other states)

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<sup>5</sup> M.G.L. c. 164, §§ 72 and 73 are set forth in their entirety in Appendix 2 of this Reply.

cannot impose requirements that would interfere with the railroad's use of its property to conduct railroad operations.<sup>6</sup>

By attempting to have § 73 alone declared preempted, P&W ignores the interplay between that section and § 72. Both provisions, read together, afford transmission companies in Massachusetts the protections and crossing rights granted to electric utilities in other states – rights that are not federally preempted if applied in a manner that does not interfere with the use of property for railroad purposes. If § 73 is deemed preempted, National Grid would be completely at the mercy of P&W (or any other railroad) because it does not have the power of eminent domain with respect to installation of transmission facilities on railroad property in Massachusetts. It would be subject to the kind of extortion as to the price for a crossing or existing lawful parallel occupation that § 73 (and similar statutes in other states) is designed to prevent. This would subvert the valid interest of the state in ensuring the delivery of reliable electric service – a mandate delegated to the states by FERC.

P&W's petition in this proceeding thus is cleverly designed to destroy National Grid's bargaining leverage, and enhance P&W's own leverage, in the negotiations regarding the compensation National Grid must pay to P&W for the easement either to relocate within P&W's right-of-way or to stay in place in the existing location. As evidenced by the attached timeline, since the institution of this proceeding,

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<sup>6</sup> P&W would be hard-pressed to show, factually, that compliance with M.G.L. c. 164, § 73 causes interference with P&W's operations given its preference to allow the O-141S line's poles to stay in place and work out alternative compensation arrangements that would facilitate its acquisition of other property for its proposed second track.



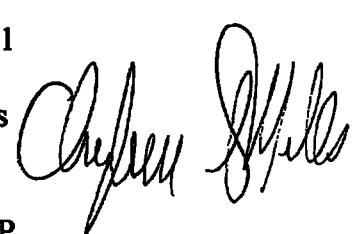
National Grid had to contact P&W two or three times before receiving any response with respect to materials it had previously provided. National Grid believes that it is only the absence of a Board order finding M.G.L. c. 164, § 73 to be preempted that has caused P&W to negotiate with National Grid in a somewhat reasonable manner. National Grid does not believe that a finding of preemption is warranted, but it is for these reasons that National Grid filed its Motion to hold this proceeding in abeyance pending the completion of the parties' negotiations. P&W's allegations with respect to National Grid's motives and position with respect to M.G.L. c. 164, § 73 are off base and the Board should consider all of the pertinent information before making its decision on the Motion.

Respectfully submitted,

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d/b/a NATIONAL GRID

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Dated: April 21, 2011

Its Attorneys

TIMELINE OF NATIONAL GRID/P&W INTERACTION FOLLOWING  
P&W'S FILING OF STB PETITION ON JULY 20, 2010

<u>Date</u>	<u>Activity</u>
8/19/10	Mark Browne of National Grid ("NG") sent Bernie Cartier, Director of Engineering for P&W, the preliminary engineering plans for the O-141S line/pole relocation and offered to meet to discuss the same.
9/1/10	NG's John Murdock sent a follow-up e-mail to Bernie Cartier noting that NG had forwarded the design plans on August 19 and again requesting a meeting with P&W's design team to discuss the plans and make sure the relocation satisfies P&W's requirements in terms of construction of a second track.
9/15/10	Mr. Cartier provided verbal comments to Mr. Murdock on the relocation plans indicating that P&W had issues with at least two proposed locations for the transmission structures.
9/16/10	Mr. Murdock confirmed the contents of the 9/15/10 conversation in an e-mail to Mr. Cartier and again requested a meeting with P&W to discuss the design.
9/17/10	P&W sent NG's Mark Browne a letter commenting on the relocation plans proposed by NG.
9/21/10	NG forwarded CAD drawings/survey to P&W to enable it to locate its second track within its existing right of way so NG could modify the original proposal. In the cover letter NG provided four optional dates for a meeting with P&W to discuss the design and relocation. (Note: P&W did not have its own plans for the second track to send NG to allow NG to design its relocated transmission line. P&W was relying on NG obtaining a survey of the limits of P&W's right-of-way in order to design its second track.)
9/22/10	NG attorney Megan Tipper sent P&W attorney Jon Meindersma an e-mail suggesting they use the 1977 form of easement agreement for the new easement.
9/23/10	Mr. Meindersma e-mailed Ms. Tipper asking for a copy of the 1977 form and also noting that P&W still had not received payment of certain flagging fees for an earlier project. (The flagging fees were ultimately paid and no longer represent an outstanding issue.)

- 9/28/10 NG's Mark Browne e-mailed P&W's Bernie Cartier asking for a response to the meeting dates suggested in NG's 9/21/2010 letter. One suggested date - September 27 - had already passed.
- 9/28/10 At 2:15 PM Mr. Cartier e-mailed Mr. Browne back indicating P&W was available to meet the next day, September 29 at 1 pm.
- 9/29/10 Meeting was held at P&W's offices in Worcester to discuss the relocation design and for NG to receive input on areas that needed to be redesigned.
- 9/30/10 NG's engineers forwarded to P&W's engineers revised drawings based on comments received from P&W on two areas of concern. NG also indicated it would update the plans with the new track layout once it received the plans from P&W for the second track layout.
- 10/14/10 Two weeks later, P&W's engineers forwarded to NG's engineers revised plans showing the P&W's proposed second track layout.
- 10/15/10 NG attorney Tipper emailed P&W attorney Meindersma checking in on his review of the proposed easement she had sent over on September 22<sup>nd</sup>.
- 11/5/2010 NG's John Murdock sent to P&W's Bernie Cartier a proposed plan proposing a new location for structure 65 which needed to be modified based on the track layout design forwarded by P&W on Oct. 14<sup>th</sup>.
- 11/23/10 NG attorney Tipper emailed P&W attorney Meindersma again to check in on his review of the proposed easement she had sent over on or around September 22<sup>nd</sup>, noting that two months had gone by.
- 11/24/10 Mr. Meindersma emailed Ms. Tipper a form of easement for review, based on the 1977 easement but with numerous changes.
- 12/1/10 As NG was still waiting on P&W regarding the proposed design and new location of structure 65, Mr. Murdock sent Mr. Cartier an e-mail indicating that the proposed schedule requiring that the line be relocated by December 2011 was in jeopardy if NG did not hear back from P&W soon on the proposed design plans.
- 12/3/10 Mr. Cartier e-mailed Mr. Murdock a plan of proposed realignment of the existing ECM Plastics sidetrack to allow for acceptable clearance of structure 65. The e-mail noted that ECM's approval would be required.
- 12/7/10 Mr. Murdock e-mailed back Mr. Cartier indicating that the plan was acceptable and the ECM Plastics sidetrack adjustment was a viable solution. He also sought input on the cost to relocate the sidetrack and whether it made better sense for NEP to locate structure 65 off the P&W

ROW and onto Millbrook property. P&W attorney Meindersma also emailed NG attorney Tipper asking for comments on the easement form, and requesting information regarding when NG would have cost estimates for the relocation of the structures.

- 12/13/10 Mr. Cartier forwarded to Mr. Murdock a plan of the sidetrack realignment Mr. Murdock had requested.
- 12/20/10 NG attorney Tipper provided comments on P&W's proposed easement and requested a meeting to finalize the design and go through the easement comments.
- 1/6/11 NG met with P&W at P&W's offices pursuant to NG's 12/20/10 request; NG provided P&W with its latest design plan for the facilities to be relocated to accommodate P&W's second track. P&W was unprepared to discuss the easement form, but agreed to provide comments soon.
- 3/29/11 NG and P&W reached agreement on the final terms for the easement for the relocated transmission line and structures.
- 3/31/11 NG provided original Meredith & Grew ("M&G") certified appraisal, dated 7/26/10, for the easement for the facilities that would need to be relocated under an earlier design plan, to P&W so P&W would have a ballpark valuation while the revised appraisal for the revised facilities locations was pending. Appraised value = \${ }.
- 4/7/11 NG provided P&W with an estimate of the facility relocation costs under the latest design plan provided to P&W in early January 2011. The total estimated cost was \${ }.
- 4/14/11 NG provided the revised M&G certified appraisal, dated 4/8/11, to P&W for the easement for the facilities that would need to be relocated under the latest design plan. Revised appraised value = \${ }.
- 4/15/11 NG provided P&W with an updated relocation cost estimate of \${ }, in response to P&W's request that NG include ALL facilities subject to the terminated license in the relocation estimate, even though NG would not actually need to relocate 2 of the 9 poles under the latest design plan. NG also agreed to provide back-up for this estimate (i.e., a written report) upon completion of NG's internal project cost review (by early May).

It should also be noted that NG made every effort to keep to the schedule it had provided prior to the filing of P&W's petition, including obtaining all of its survey, title and other due diligence materials on or prior to the scheduled dates, and weekly internal project meetings on progress (not reflected in the above timeline) were conducted. In addition,

NG attorney Brian Mulcahy (who inherited the matter from Ms. Tipper in mid-January 2011) has had regular contact with P&W attorney Meindersma to advance the relocation project. This included multiple weekly contacts and a telephonic conference on a weekend in March, at Mr. Mulcahy's suggestion, in an effort to complete the easement agreement expeditiously. Since early March, almost all of the focus of Mr. Mulcahy's discussions with Mr. Meindersma, in terms of valuation, has been on the "stay-in-place" alternative, under which the transmission line and structures would remain in their present location and NG would pay P&W one-half the avoided cost of relocating the facilities plus the easement value, which P&W would then use to purchase needed property from other entities. Mr. Meindersma noted in recent discussions with Mr. Mulcahy that P&W has not done any due diligence to-date to ascertain the feasibility of, or costs associated with, locating its second track on adjoining properties owned by other third parties.

<b>PART I ADMINISTRATION OF THE GOVERNMENT</b> (Chapters 1 through 182)
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<b>TITLE XXII CORPORATIONS</b>
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<b>CHAPTER 164 MANUFACTURE AND SALE OF GAS AND ELECTRICITY</b>
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<b>Section 72 Taking land for transmission lines</b>
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Section 72. (a) Any electric company, distribution company, generation company, or transmission company or any other entity providing or seeking to provide transmission service may petition the department for authority to construct and use or to continue to use as constructed or with altered construction a line for the transmission of electricity for distribution in some definite area or for supplying electricity to itself or to another electric company or to a municipal lighting plant for distribution and sale, or to a railroad, street railway or electric railroad, for the purpose of operating it, and shall represent that such line will or does serve the public convenience and is consistent with the public interest. The company shall forward at the time of filing such petition a copy thereof to each city and town within such area. The company shall file with such petition a general description of such transmission line and a map or plan showing the towns through which the line will or does pass and its general location. The company shall also furnish an estimate showing in reasonable detail the cost of the line and such additional maps and information as the department requires. The department, after notice and a public hearing in one or more of the towns affected, may determine that said line is necessary for the purpose alleged, and will serve the public convenience and is consistent with the public interest. If the electric company, distribution company, generation company or transmission company or any other entity providing or seeking to provide transmission service shall file with the department a map or plan of the transmission line showing the towns through which it will or does pass, the public ways, railroads, railways, navigable streams and tide waters in the town named in said petition which it will cross, and the extent to which it will be located upon private land or upon, under or along public ways and places, the department, after such notice as it may direct, shall give a public hearing or hearings in 1 or more of the towns through which the line passes or is intended to pass. The department may by order authorize an electric company, distribution company, generation company, or transmission company or any other entity to take by eminent domain under chapter 79 such lands, or such rights of way or widening thereof; or other easements therein necessary for the construction and use or continued use as constructed or with altered construction of such line along the route prescribed in the order of the department. The department shall transmit a certified copy of its order to the company and the clerk of each such town. The company may at any time before such hearing change or modify the whole or a part of the route of said line, either of its own motion or at the instance of the department or otherwise, and, in such case, shall file with the department maps, plans and estimates as aforesaid showing such changes. If the department dismisses the petition at any stage in said proceedings, no further action shall be taken thereon, but the company may file a new petition after the expiration of a year from such dismissal. When a taking under this section is effected, the company may forthwith, except as hereinafter provided, proceed to erect, maintain and operate thereon said line. If the company shall not enter upon and construct such line upon the land so taken within one year thereafter, its right under such taking shall cease and determine. No lands or rights of way or other easements therein shall be taken by eminent domain under the provisions of this section in any public way, public place, park or reservation, or within the location of any railroad, electric railroad or street railway company except with the consent of such company and on such terms and conditions as it may impose or except as otherwise provided in this chapter; and no electricity shall be transmitted over any land, right of way or other easement taken by eminent domain as herein provided until the electric company, distribution company, generation company, or transmission company or any other entity shall have acquired from the board of aldermen or selectmen or from such other authorities as may have jurisdiction all necessary rights in the public ways or public places in the town or towns, or in any park or reservation, through which the line will or does pass. No entity shall be authorized under this section or section 69R or section 24 of chapter 164A to take by eminent domain any lands or rights of way or other easements therein held by an electric company or transmission company to support an existing or proposed transmission line without the consent of the electric company or transmission company.

[There is no subsection (b).]

**PART I ADMINISTRATION OF THE GOVERNMENT**  
(Chapters 1 through 182)**TITLE XXII CORPORATIONS****CHAPTER 164 MANUFACTURE AND SALE OF GAS AND ELECTRICITY****Section 73 Pipes, mains, wires and conduits crossing railroads**

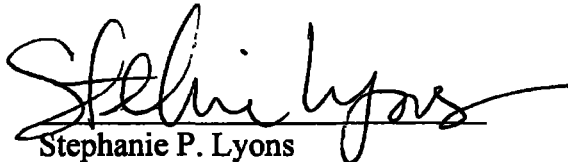
Section 73. A corporation subject to this chapter, to the extent that it is authorized to make, sell, transmit or distribute gas or electricity, or both, may, for the purposes of such sale, transmission, or distribution, lay, erect and maintain pipes, wires, mains and conduits under, over or across the location on private land of any railroad, electric railroad or street railway corporation at such places and in such manner and on such terms and conditions as it may agree upon with such corporation, or, in case of failure so to agree, then with the consent of the department and at such places, in such manner, with such safeguards and upon such compensation, terms and conditions as it may specify; but no pole, tower or similar structure shall be located within the location of such railroad, electric railroad or street railway corporation without its consent; provided, however, that if such corporation has lawfully constructed for such purposes poles, towers or similar structures within the location of such railroad, electric railroad or street railway corporation, then it shall not thereafter be required to remove, abandon or cease to operate such facilities without the consent of the department. If the department, after notice and public hearing, determines that the continued operation of such facilities will serve the public convenience and is consistent with the public interest, it shall specify the terms and conditions for the continued operation thereof, including compensation to any person or corporation lawfully entitled thereto. The department may, from time to time, specify such changes in the manner of laying, erecting and maintaining such pipes, mains, wires and conduits and such facilities, and, in the terms and conditions thereof, as it deems advisable.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of April, 2011, I caused a copy of the foregoing Motion for Leave to File a Reply to a Reply and accompanying Reply to Providence and Worcester Railroad Company's Reply to Motion to Hold Proceedings in Abeyance (Public Version) to be served by email on counsel for Petitioner Providence & Worcester Railroad Company and other interested parties, as follows:

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